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Nos. 619 and 620

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In the Supreme Court of the United States

JOHN T. FEY, Clerk

OCTOBER TERM, 1956

CHESTER E. JACKSON, PETITIONER

v.

JOHN C. TAYLOR, ACTING WARDEN, UNITED STATES
PENITENTIARY, LEWISBURG, PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

HARRIEL L. FOWLER, PETITIONER

v.

FREDERICK H. WILKINSON, WARDEN, UNITED STATES
PENITENTIARY, ATLANTA, GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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PETITION NOT PRINTED

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 620

HARRIEL L. FOWLER,

Petitioner

v.

**FREDERICK H. WILKINSON, WARDEN, UNITED
STATES PENITENTIARY, ATLANTA, GEORGIA,**

Respondent

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

BRIEF FOR PETITIONER .

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 620

HARRIEL L. FOWLER,

v.

Petitioner

FREDERICK H. WILKINSON, WARDEN, UNITED
STATES PENITENTIARY, ATLANTA, GEORGIA,

Respondent

BRIEF OF THE PETITIONER ON THE MERITS

Reference to the Opinions in the Courts Below

The United States District Court for the Northern District of Georgia filed an unreported opinion (R. 22) in this case *sub nom. Fowler v. Hardwick*, decided December 27, 1955, wherein the Court granted the petitioner's application for a writ of *habeas corpus* and ordered his release upon posting bond to answer to the final judgment upon appeal. This judgment was appealed by the respondent to the United States Court of Appeals for the Fifth Circuit where it was reversed in a per curiam decision, 234 F. 2d 615 (June 27, 1956).

Statement of the Grounds on Which Jurisdiction of This Court Is Involved

The jurisdiction of this Court to review this case is based on a conflict of decisions of the United States Court of Appeals for the Fifth Circuit in the instant case of *Wilkinson v. Fowler*, 234 F. 2d 615, with the decision of the United States Court of Appeals for the Seventh Circuit in the case of *DeCoster v. Madigan*, 223 F. 2d 906. Both defendants were involved in the same court-martial proceedings from which this appeal stems.

The District Court's order for the petitioner's release was reversed by the United States Court of Appeals for the Fifth Circuit on June 27, 1956. Within ninety days after the entry of the judgment of the Court of Appeals, the petition for certiorari to review the judgment of the Court of Appeals together with a motion to proceed in *forma pauperis*, with petitioner's affidavit attached, were filed in this Court in compliance with Rules 22, 23 and 53 of the Revised Rules of the Supreme Court of the United States.

The statutory provisions upon which the jurisdiction of this Court is invoked to review this case are as follows:

Title 28, U.S.C.A., Section 1254, provides in pertinent part as follows:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ."

Rules 19 of the Revised Rules of the Supreme Court of the United States provides as follows:

"(1) A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted

only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons that will be considered:

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; . . . or has decided an important question of federal law which has not been, but should be, settled by this court; . . ."

Constitutional Provisions and Statutes Involved

United States Constitution, Amendment V, provides as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Article of War 92, formerly Title 10, U.S.C.A. Section 1564 (recently revised and recodified as Title 10, U.S.C.A. Section 918, P.L. 1028, 84th. Congress, 2d Session, approved August 10, 1956) provides:

"Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct; but if found guilty of murder

not premeditated, he shall be punished as a court-martial may direct. Any person subject to military law who is found guilty of rape shall suffer death or such other punishment as a court-martial may direct; Provided, That no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace."

Article of War 96, formerly Title 10, U.S.C.A. Section 1568 (recently revised and recodified as Title 10, U.S.C.A. Section 934, P.L. 1028, 84th. Congress, 2d Session, approved August 10, 1956) provides:

"Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court. May 5, 1950, c. 169, Section 1, 64 Stat. 142."

Section 66 of the Uniform Code of Military Justice, formerly Title 50, U.S.C.A. Section 653 (recently revised and recodified as Title 10, U.S.C.A. Section 866, P.L. 1028, 84th. Congress, 2d Session, approved August 10, 1956) provides as follows:

"(a) The Judge Advocate General of each of the armed forces shall constitute in his office one or more boards of review, each composed of not less than three officers or civilians, each of whom shall be a member of the bar of a Federal Court or of the highest court of a State of the United States.

(b) The Judge Advocate General shall refer to a board

of review the record in every case of trial by court-martial in which the sentence, as approved, affects a general or flag officer or extends to death, dismissal of an officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more.

(c) In a case referred to it, the board of review shall act only with respect to the findings and sentence as approved by the convening authority. It shall affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determine, on the basis of the entire record, should be approved. In considering the record it shall have authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(d) If the board of review sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) The Judge Advocate General shall, unless there is to be further action by the President or the Secretary of the Department or the Court of Military Appeals, instruct the convening authority to take action in accordance with the decision of the board of review. If the board of review has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(f) The Judge Advocate General of the armed forces shall prescribe uniform rules of procedure for proceedings in and before boards of review and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the offices of the Judge Advocate General and by the boards of review. May 5, 1950, c. 169, Section 1, 64 Stat. 128."

habeas corpus to fix his punishment. The military court gave him a life sentence. Had they given him twenty years for assault with attempt to rape that sentence would now be good, the murder conviction being set aside. *This Court cannot assume that had he not been sentenced for murder, however, his sentence for attempt to rape would have been twenty years.*" (Emphasis supplied)

Conclusion

: Since it appears that the Board of Review did not comply with its prescribed powers as defined in Section 66(d) of the Uniform Code of Military Justice and since the arbitrary, harsh imposition of sentence was outside its authority as set out in Section 66(c), it follows that the decision of the Court of Appeals for the Fifth Circuit in this case should be reversed and the decision of the United States District Court for the Northern District of Georgia, wherein the petitioner was granted a writ of habeas corpus, should be sustained and the petitioner be released from further custody.

Respectfully submitted,

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